DRN-3245141

The complaint

Mr M complains about advice received from St James's Place Wealth Management Plc ("SJP") to invest in a series of Enterprise Investment Schemes ("EIS").

What happened

Mr M took out three consecutive EISs in 2014, 2015 and 2016 for £40,000, £40,000 and £45,000 respectively. Mr M said SJP led him to believe he was entering into three-year investments and when each plan matured, he would be able to "roll over" the proceeds into another EIS to secure income tax efficiency. However, the maturity of each of the EISs went on to significantly exceed this timeline. Mr M also said he was exposed to more risk than he had intended to take. He felt the risks and volatility of the EISs were not fully explained to him. He also recalled raising concerns at the time about the EIS declarations but was assured that the investments were safe and the forms were for compliance. Mr M relied upon the advice provided by his adviser, whom had he known for many years and believed that he had been misled. Mr M seeks compensation for the losses he has sustained.

SJP denied that any guarantee was given about a three-year term, the EISs were medium to long-term investments. SJP relied upon the information contained within the Information Memorandums ("IMs") for each EIS and the EIS declarations signed by Mr M, which highlighted that the investments were high risk and illiquid. They maintained it was reasonable to expect Mr M to have familiarised himself with this information. Mr M had investment experience and less than 5% of his investable wealth was invested on each occasion. Whilst Mr M's attitude to risk had been lower for other investments, SJP maintained that he had been prepared to take more risk for tax advantages in respect of these investments.

Our investigator considered the complaint and decided to uphold it. She thought that Mr M had only been prepared to take more risk with the investments on the basis he could meet his objective of exiting after three years and investing again for tax relief. She wasn't persuaded that Mr M had a proper understanding of the way the investments worked and the high risks of the strategy. Our investigator thought the adviser had led Mr M to believe he could utilise a three year, rolling investment strategy and shared with SJP, a series of emails in which Mr M's understanding was set out. Further, she noted it was common ground that the adviser was aware Mr M was unhappy signing the EIS declarations at the time and it wasn't enough for the adviser to expect Mr M to read the product literature. Overall, she didn't think Mr M was made properly aware of the liquidity risks and the recommendation failed to meet his objectives. Along with recommending compensation for financial loss, our investigator also awarded £300 for distress and inconvenience resulting from the shortcomings with the recommendations.

SJP disagreed with the view. They maintained that Mr M had been prepared to take a higher risk with these investments and his clear motivation was income tax relief. They pointed out that Mr M went onto invest in similar high-risk products and concluded it was likely Mr M would have invested even if the EISs had a longer minimum term. Given Mr M's professional background it was reasonable to have expected him to have understood the information provided by the product providers. And whilst Mr M had raised some concern with the EIS declarations, ultimately, he had proceeded with the investments. SJP maintained that the risks were made clear.

As the parties do not agree, the matter has come to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As SJP recommended this strategy of investment, I've considered whether the advice was suitable for Mr M. As at 2014, Mr M held over £1million in bonds, £29,682 in an ISA and £39,688 in a Unit Trust Feeder Account. He also held £125,000 in cash and had recently set up on a self-employed basis. He was advised to invest £40,000 into an EIS with an £1,200 initial adviser charge. After other funds were provided to family, this left £23,600 on deposit. Mr M's financial position was broadly similar in 2015 and 2016, where he invested £40,000 and then £45,000 in different EISs.

Mr M said his attitude to risk was usually medium/lower medium and he hadn't intended to expose himself to high risk. Whilst SJP didn't dispute Mr M's other investments had a lower risk profile, they maintained that Mr M had agreed to take a higher level of risk above his usual risk profile, to secure tax advantages.

I agree that the suitability letters each say Mr M had agreed to undertake a higher level of risk to secure tax advantages, but I've balanced that against Mr M's understanding of the investment strategy advanced by his adviser, namely, that he was entering into a series of three-year investments.

Mr M is clear that his objective was to create three yearly rolling investments, whereby he could utilise the income tax benefits offered by EIS and re-invest at the three-year point of exit. On balance, I consider it is likely that the adviser led Mr M to believe that the EISs met this objective, that's evident from 2014 suitability letter which said Mr M was looking to keep invested in an EIS to receive tax advantages in the future, further, it was recorded that Mr M intended, *"to use your investment to generate a lump sum in three years' time, but it is your intention to keep reinvesting into an EIS every three years to benefit from tax relief and Capital Tax Gains deferral."* I've also seen correspondence in which the adviser agreed he set out an expectation that once Mr M had exited the investment he could roll it into a further EIS to claim tax relief again, "*and so on and so on.*"

The March 2015 suitability letter referred to investment for the medium term, but also spoke about the aim and objective of preserving capital over the three-year period. On balance, I'm persuaded that Mr M relied on discussions with his adviser and that the rolling strategy discussed in 2014 remained the overarching, recommended approach for each EIS. This is supported in an email from Mr M to his adviser in February 2016, where discussion took place about investing in a VCT (with a 5 year exit point), Mr M raised concern that the VCT time line might "mess up" the tax planning said to be agreed as:

1st EIS-2013/14 Tax Year

2nd EIS-2014/15 Tax Year

3rd EIS 2015/2016 Tax Year?

1st EIS renew/2nd ESI renew ++

As we discussed the plan was to run a ‘rolling’ set of EIS funds to cover annual taxes . . . if we go with VCT how will this work? (Presumably I would need 5 VCT’s? – which means £200K tied up in high risk?

I’ve seen that the third suitability letter also referred to investing for five years or longer, but I’m not persuaded that the underlying investment strategy had changed, given the consistency of Mr M’s testimony supported by the above. And that the actual investment timeline he followed was consistent with the original plan to take out three EIS products in successive years. Further, in email correspondence with the adviser in 2019, Mr M’s again raised his dissatisfaction that the three-year investment timeframe had been exceeded and the maturity timelines were not reflective of the advice/expectation given at inception.

I’ve also noted that the suitability letters contained some errors such as the 2015 referring to an objective of achieving higher levels of capital growth, whereas the objective for this EIS was to preserve capital. Further, the adviser acknowledged there were errors in the third suitability letter, leading to a second letter being sent in June 2016, confirming that the main objective was income tax relief.

Mr M has explained that this rolling investment objective was also part of his school fees planning and had he been aware that his funds risked being tied up for much longer periods he wouldn’t have invested in each EIS. On balance, I’m persuaded this is likely. I’ve seen correspondence from the adviser in which he agreed that Mr M’s goal was to fund school fees and mitigate tax. Mr M’s position is captured in email correspondence from 2018 in which he raised concern about the impact of the delay on his ability to meet the school fees.

I’ve considered the evidence in the round and in making my decision on the balance of probabilities, I’m persuaded that it is more likely than not that Mr M’s recollection of events is more reliable. That’s further supported by the fact that the adviser now accepts that Mr M raised concerns about the EIS declarations, which the adviser required him to sign. And whilst it is common ground that Mr M did decide to proceed with investment into each EIS, Mr M is clear that he only did so because the adviser told him “not to worry”, the form was a compliance formality and the investments were safe. So, I’m not persuaded it’s reasonable to place weight on that EIS declarations. I think it is more likely than not that Mr M relied upon what the adviser told him.

I’ve noted SJP’s position that weight was placed upon Mr M being a professional and that he ought to have identified the risk factors from the IMs for each product. But, as SJP was providing professional advice, it was for them to make a suitable recommendation having regard to Mr M’s circumstances, attitude to risk, objectives and capacity for loss and responsibility fell to the adviser to clearly explain the risks to Mr M. For the reasons set out above, I’m not persuaded things were made clear. There is nothing to show that the adviser explained the high risks of this strategy, which would collapse if the funds within each EIS were tied up for an extended period.

I’ve seen that Mr M had some capacity for loss. The figures show some funds were being retained on deposit and as set out above, Mr M held other assets. But this factor has to be considered when assessing suitability in the round.

On balance, I am persuaded that it is more likely than not that Mr M was misled about the realistic timeline for exiting each EIS. I consider, on balance, that investments which risked illiquidity of up to four and half years or more were not in line with his objectives and tying the funds up exposed him to more risk than he was willing to take. On balance, I am not satisfied that Mr M would have proceeded with the investments if he had understood that his funds risked being tied up for many more years.

In light of the above, I am not satisfied that the recommendations were suitable for Mr M's needs. It follows, that it is fair and reasonable for SJP to put things right for Mr M.

Putting things right

In order to put things right, I've considered how to put Mr M back into the position he'd have probably been in if he hadn't been given unsuitable advice, which isn't as straightforward as simply refunding the original investment.

I'm mindful that had it not been for the unsuitable advice, Mr M wouldn't have had the potential EIS tax relief and he wouldn't have whatever value (if any) the remaining EIS now has.

Given the information Mr M has provided, I think he'd have invested differently. It isn't possible for me to say precisely what he would have done, so I've considered what I think is fair and reasonable given his circumstances and objectives when he invested. I'm persuaded by his testimony that if the three-year rolling option had not been available to him, he would likely have invested in line with this usual attitude to risk. I've also considered his testimony about the need to access some funds for school fees.

To compensate Mr M fairly, SJP must:

• Compare the performance of Mr M's investment with that of the benchmark shown below and pay the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

• SJP should also pay interest as set out below.

Income tax may be payable on any interest awarded.

Investment name	Status	benchmark	from ("start date")	To ("end date")	Additional interest
Oxford Capital Infrastructure	Surrendered	FTSE WMA Stock Market Income Total Return Index and then from 1 March 2017 the FTSE UK Private Investor Income Total Return Index	Date of investment	Date of surrender	8% simple per year on any loss from the end date to date of settlement
Ingenious Shelley Media EIS Spring 2015	Still exists but illiquid	FTSE WMA Stock Market Income Total Return Index	Date of investment	Date of settlement	8% simple per year from date of decision to

		and then from 1 March 2017 the FTSE UK Private Investor Income Total Return Index			date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)
Ingenious Infrastructure	Surrendered	FTSE WMA Stock Market Income Total Return Index and then from 1 March 2017 the FTSE UK Private Investor Income Total Return Index	Date of Investment	Date of surrender	8% simple per year on any loss from the end date to date of settlement

actual value
This means the actual amount payable from the investment at the end date. If at the end date the investment is illiquid (meaning it could not be surrendered or readily sold on the open market), it may be difficult to work out what the actual value is. In such a case the actual value should be assumed to be zero. This is provided Mr M agrees to SJP taking ownership of the investment, if it wished to. If it is not possible for SJP to take ownership, then it can request an undertaking from Mr M that he repays to SJP any amount he might receive from the investment in future.

SJP may also add to the actual value any available tax reliefs Mr M has received by virtue of making the investment. It may ask him for evidence of this, or assume he has availed himself of all available relief at his marginal rate of tax.

For ease it can calculate the value of the available relief and add it to the actual value as one figure at the end.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any withdrawal from Ingenious Shelley Media Infrastructure should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if you total all those payments and deduct that figure at the end to determine the fair value instead of deducting periodically.

The Ingenious Shelley Media Infrastructure only exists because of illiquid investments. In order for this investment to be closed and further fees that are charged to be prevented, those investments need to be removed. I’ve set out above how this might be achieved by you taking over the investment, or this is something that Mr M can discuss with the provider directly. But I don’t know how long that will take.

Third parties are involved, and we don’t have the power to tell them what to do. If you are unable to purchase the investment, to provide certainty to all parties I think it’s fair that you pay Mr M an upfront lump sum equivalent to five years’ worth of wrapper fees (calculated using the fee in the previous year to date), if applicable. This should provide a reasonable period for the parties to arrange for the Ingenious Shelley Media Infrastructure to be closed.

why is this remedy suitable?

I decided on this method of compensation because:

• Mr M was willing to accept some investment risk.

• The WMA index and Private Investor index are made up of diversified indices representing different asset classes, mainly UK equities and government bonds. They would be a fair measure for someone who was prepared to take some risk to get a higher return.

• Although they are called income index, the mix and diversification provided within the index is close enough to allow me to use them as a reasonable measure of comparison given Mr M’s circumstances and risk attitude.

I have also considered that Mr M has suffered distress at being unable to access his funds at the point he had expected to. I consider that it is more likely than not that he has suffered distress and upset as a result of the advice given and the subsequent locking into an investment, which was unsuitable for his needs. In my view it is fair and reasonable to make an award of compensation and I consider that £300 is a fair sum.

My final decision

For the reasons given, I am upholding this complaint. I direct SJP to put things right for Mr M as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 9 November 2022.

Sarah Tozzi
Ombudsman